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In the Supreme Court

of the United States

October Term, 1971

71-48

JUDITH BARBARA WILLIAMSON,

Respondent,

v.

WESTERN PACIFIC DREDGING CORP.,

Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported in 441 F.2d 65 (App. 25). The opinion of the United States District Court for the District of Oregon is reported in 304 F. Supp. 509 (App. 1).

JURISDICTION

The judment of the Court of Appeals was made and entered April 9, 1971.

Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether a dredge hand, who commutes daily from his home, is entitled to a seaman's benefits of maintenance and cure if he is injured in an automobile accident on his way to work.

2. Whether the owner of a dredge is liable under the Jones Act for negligent operation of an employee's automobile by the employee while on his way to work and transporting another employee to work.

STATUTES INVOLVED

The statute involved is 46 U.S.C.A. § 688, commonly known as the Jones Act:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be

under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF THE CASE

This case arose out of fatal injuries received by Joel Williamson on December 21, 1967, when the automobile, in which he was a passenger, went out of control and collided with a truck. The accident occurred on Interstate 5 about fifteen miles north of Vancouver, Washington. The automobile was driven by Don Ferguson. Another passenger was only slightly injured. The men were on their way to work for Western-Pacific Dredging Corp., the petitioner herein.

The petitioner Western-Pacific Dredging Corporation had a contract with the Corps of Engineers to dredge certain areas of the Columbia River for channel improvement. To perform its contract, petitioner used its hydraulic dredge H. W. McCURDY. Western-Pacific operated the dredge with crews on a rotating shift basis, i.e., one week of day shift, the next on the swing shift and the following on the graveyard shift and so on. Western-Pacific designated certain points on shore as pick-up points for the crew coming on shift to be picked up and the crew going off shift to be landed.

The decedent, Joel Williamson, was mate for one shift and at the time of his death on December 21, 1967, was on his way to work the day shift.

The decedent was in the habit of riding part way to and from the pick-up point with one of the deckhands, defendant Don Ferguson, alternating cars. Williamson and Ferguson had been picking up another crewmember, the leverman Edward Roberts, because his own car had become unreliable.

Western-Pacific, as one of the provisions with the union to which the dredge crew belonged, paid each employee $4.00 "travel pay."

The allowance depended on the distance of the job from designated city halls.

The petitioner's superintendent LeRoy Nielson had told the men he "would rather have them take their own car" in case somebody might be held over and in case of an automobile accident or breakdown.

On December 21, 1967, Ferguson, driving his own car, picked up the decedent, then Roberts, as customary, and was proceeding to the designated pick-up point for transportation to the dredge when the Ferguson vehicle went out of control, crossed the median strip and hit an oncoming truck. The trial court found Ferguson negligent in the operation of his automobile and petitioner vicariously liable.

No issue is raised as to the findings of negligence of Ferguson or the findings that the truckowner was free from fault. Petitioner contests its liability.

The plaintiff invoked jurisdiction under 28 U.S.C.A. § 1333 (Admiralty and Maritime Claims) in the District Court. The District Court in its opin-

ion stated that the defendant's challenge to the right to receive maintenance and cure challenged the admiralty jurisdiction of the Court (App. 9).

SUMMARY OF ARGUMENT

Maintenance and Cure

Maintenance is the right to food and lodging while aboard ship. Cure is the duty of furnishing medical attention to a sick or injured seaman. In terms of an award of benefits, maintenance and cure is the right to food, lodging and medical attention aboard ship, or if the seaman leaves the ship, its monetary equivalent. The right is ancient.

Until the decision in the instant case, the right to maintenance and cure has never been extended, as a matter of policy, to day workers for injuries received going to and from work.

The District Court stated that the award of maintenance and cure in this case "would be going outside the perimeter of established case law." (App. 12).

The policy of extending maintenance and cure benefits to the day worker for commuter injuries, while well intentioned, is shortsighted and narrow. Workmen's compensation acts, compulsory automobile insurance, and private insurance would in most cases provide benefits which exceed the value of maintenance and cure but which almost invariably

would not be available to seamen injured in the course and scope of their employment. Workmen's compensation benefits under state acts are usually denied workers who have benefits under Federal acts and, of course, insurance policies usually exclude coverage for on-the-job injuries.

The expansion of Federal jurisdiction into this area of everyday life is ill-conceived because as the employee moves away from the vessel it becomes more difficult to separate the job from personal life; likewise, on his return. The doctrine of maintenance and cure should be easy and simple to apply; the logical boundry for daily commuters is the shoreline.

Jones Act Recovery

The Federal Employers Liability Act was enacted to relieve the injured employee of the risks of his employment caused by negligence. As extended to seamen by 46 U.S.C.A. § 688, the same result was intended. The District Court frankly stated that imposing Jones Act liability in this case was invading "virgin territory." (App. 19). The Court of Appeals posited its affirmance on the "particular" facts of this case saying that the question was factual and had "adequate support in the record." (App. 25, 27).

Liability for negligence under the Jones Act depends upon the negligent actor being within the course and scope of his employment. Liability of Western-Pacific in this case for the negligence of the automobile driver Ferguson was found because he

was paid travel pay. However, the negligent automobile driver was not hired or directed by the defendant to transport his fellow workmen. He was merely reimbursed for his personal expenses. The employer could neither direct nor prohibit him from giving his fellow employees a ride.

The courts below refused to give any weight to the fact that the employer had no control over the commuting of employees, citing this Court's decision in *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), a workman's compensation case. The award of benefits under a workmen's compensation act has an entirely different rationale than an award of damages for negligence.[1] Liability predicated on negligence to have any social utility or justification must to some extent be based on the employer's right to supervise (and ultimately to discharge) the allegedly negligent employee. It is manifestly unfair to impose liability where there is no control. This Court has never held

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[1] "A servant is a person employed by his master to perform service for him in his affairs with the retention by the master of control, or the right of control, over the physical details of the service." [citing in 1968 Supp. to Vol. 2, Rest. Agency 2d §§ 219 (1), 220 (1)]. * * *

"No free man, however, is a servant all the time—not even when, for payroll purposes, he is on the job—and the master's liability extends only to those acts which are regarded as done within the scope of the servant's employment" [citing Holmes Agency II, 5 Harv. L.R. 1, 16 (1892)]. Harper & James, Vol. 2, The Law of Torts p. 1374, § 26.6.

A holding that scope of employment is established for compensation purposes in a going and coming case does not establish the narrower requirement of acting within the scope of employment for creating vicarious liability. *Lundberg* v. *New York*, 306 N.Y.S.2d 947, 255 N.E.2d 177 (Ct. App. N.Y., 1969). See Harper & James, The Law of Torts § 13.2

otherwise. See *Hopson* v. *Texaco, Inc.*, 383 U.S. 262 (1966).

The courts below, having found that the driver was in the service of the ship, for maintenance and cure purposes equated "in the service of the ship" with "in the course and scope of employment" and therefore were able to conclude that the employer would be vicariously liable for the negligence of the driver. This syllogism is an unwarranted extension of this Court's decision in *Braen* v. *Pfeifer Oil Trans. Co.*, 361 U.S. 129 (1959).

Conflicting Decisions

The holding in this case is in conflict with the holding in *McCall* v. *Overseas Tankship Corp.*, 222 F.2d 441 (C.A. 2, 1955) where the Court held that payment for transportation did not make the shipowner liable for the negligence of an airline in transporting seamen to their home port.

The decision here awarding maintenance is also in conflict with the case of *Sellers* v. *Dixilyn Drilling*, 433 F.2d 446 (C.A. 5, 1970), where the Court refused maintenance for an accident on the way home from work (no travel pay was involved).

Petitioner submits that the decision here is also in conflict with *Thurnau* v. *Alcoa Steamship Co.*, 229 F.2d 73 (C.A. 2, 1956) cert. den. 351 U.S. 925 where Jones Act liability was denied for injuries received in an automobile accident while returning from shore leave.

The decision here is also in conflict with principles established in FELA cases.

ARGUMENT

Maintenance and Cure

The right to maintenance and cure is an ancient one. It seems to have been recognized in American admiralty matters from the founding of the Republic. In a series of cases this Court has firmly established the rule that disability from illness or injury incurred aboard the vessel or on "shore leave" entitles the seaman to maintenance and cure until he has returned to work or at least reached a stationary plateau and unearned wages until the end of the voyage or until he is able to return to work, whichever occurs first. See *Aguilar* v. *Standard Oil Co. of N.J.*, 318 U.S. 724 (1943); *Farrell* v. *U.S.*, 336 U.S. 511 (1949); *Warren* v. *U.S.*, 340 U.S. 523 (1951). In *Aguilar*, this Court stated:

> "We think that the principles governing shipboard injuries apply to the facts presented by these cases. To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline.

> Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landsman, therefore, 'the superfluous is the necessary . . . to make life livable and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion.
>
> "The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If in those surroundings the seaman, without disqualifying misconduct,, contracts disease or incurs injury, it is because of the voyage, the shipowner's business. That business has separated him from his usual places of association. By adding this separation to the restrictions of living as well as working aboard, it forges dual and unique compulsions for seeking relief wherever it may be found. In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment." 318 U.S. 724 at 733-4.

The decedent in this case can hardly be said to have been on shore leave.

He spent approximately one-third of each day on board the dredge or its attending work boats. He

ate and slept at home. Ashore and coming and going to work, he was no different than any workman in many industries requiring their presence at out-of-the-way locations.[2] Many persons daily commute comparable or greater distances than the decedent. The decedent's status at the time of his injury does not meet the guidelines or reasoning of *Aguilar*. Defendant's business did not separate him from his usual places of association. There is no reason why a workman such as Williamson cannot be a seaman only when he is on the vessel and not a seaman in his off-duty hours at home and coming from and going home.

The defendant's attempt to make this distinction in the District Court was labeled "misty" (App. 11) and discarded. In holding the distinction unreasonable, the District Court relied on *Weiss* v. *Central R. Co.*, 235 F.2d 309 (C.A. 2, 1956) In *Weiss* the Court said that a day-worker would not be denied maintenance because he lived at home; however, his disability was job-related. The Court did not say that if he had been injured at home or going to and from home he would have been awarded maintenance. The Court related that:

> "While employed as a seaman aboard the ferryboats Wilkes-Barre, Somerville, and West-

[2] The District Court was rather disturbed that petitioner's compensation carrier had rejected the widow's state compensation claim (App 9). The rejection was issued not because the decedent was a seaman, but because he was not within any exception to the going and coming rule. See e.g. *Balise* v. *Underwood*, 428 P.2d 573 (Wash., 1967). Collateral estoppel would prevent petitioner from later claiming at a compensation hearing that the decedent was a seaman. *Roth* v. *McAllister Bros., Inc.*, 316 F.2d 143 (C.A. 2, 1963).

field, plaintiff became ill by reason of a reactivation of a latent condition of pulmonary tuberculosis. There was evidence that this condition was produced by the physical exertion involved in working aboard ferryboats, particularly the running up and down stairs incident to his duties as a wheelsman. . . ." 235 F.2d 309 at 310.

The trial judge stated that in granting maintenance and cure he was going outside the perimeter of established case law (App. 12). This statement appears to be entirely correct. The maintenance cases awarding maintenance for shoreside injuries appear without exception to be awarding benefits to seamen off the ship on shore leave.[3]

In the recent case of *Sellers* v. *Dixilyn Corporation, supra*, maintenance was denied a roustabout who was enroute from the drilling rig on which he worked in the Gulf of Mexico to his home in Colfax, Louisiana. The Court held that Sellers could not be said to be on

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[3] In addition to the shore leave cases decided by this Court cited above, petitioner would bring the Court's attention to two lower court cases in this area. In *Palmer* v. *Boat Edith L. Boudreau*, 223 N.E.2d 919 (Mass. 1967) a fisherman was awarded maintenance and cure for an injury suffered in a shower at home. Apparently the fishing vessel made voyages of at least a week. The seaman was hired on July 1 and the second voyage ended July 18. The Massachusetts court seemed concerned as to whether benefits would be extended for injuries received in a home port on shore leave. In awarding maintenance the Court relied on *Smith* v. *U.S.*, 167 F.2d 550 (C.C.A. 4, 1948). In *Smith* the seaman had signed foreign articles and ate and slept aboard the vessel prior to sailing. He was "granted shore leave" to go home and was injured while ashore. Maintenance, cure and wages were allowed. The Court of Appeals said no distinction would be made for injuries received on shore leave in home port.

authorized shore leave at the time of the accident. The Court said that his time off "bore little resemblance to the shore leave of the traditional blue water seaman." The Court reviewed the facts of the case against the standards set by *Aguilar* and found that the test was not met. The Court pointed out that there was a regularly scheduled work arrangement which allowed definite periods ashore and on the rig. If the man was off duty and was called back to the rig, he would go back if he wanted to work the extra time. Whether the man returned or not would be his own choice. He was not subjected to foreign accommodations but during his time off he was able to maintain a home life of ordinary shore dwellers. The Court concluded that Sellers was neither on authorized shore leave nor answerable to the call of duty. But for the fact that Sellers was going home and Williamson was going to work and the fact that Williamson received $4.00 a day travel pay, there is no significant distinction between *Sellers* and *Williamson*. Travel pay was an incident of the contract negotiated by Williamson's union and not an incident of maritime service. The travel pay should, therefore, be disregarded in determining whether Williamson was on ship's business, on authorized shore leave or answering the call of duty. It is submitted that the rationale of *Sellers* establishes a more uniform rule and is more logical than Williamson and should be adopted as the rule in commuting cases.

Jones Act Liability

In *O'Donnell* v. *Great Lakes Dredge and Dock Company*, 318 U.S. 36 (1943) this Court extended Jones Act liability to a seaman working ashore assisting in the discharge of his vessel.

Subsequently, in a series of cases liability was denied for injuries received ashore usually involving "blue water" sailors going to and from their ship.

In *Thurnau*, *supra*, the decedent was killed in an automobile accident while returning from shore leave. The negligence of a fellow crewmember driving the car (rented by the men) was the cause, so a jury could have found. The Court of Appeals, distinguishing maintenance and cure cases, *Warren* v. *U.S.*, *supra* and *Aguilar* v. *Standard Oil Co.*, *supra*, held that, assuming a seaman was in the course and scope of his employment, the shipowner had no duty to provide transportation and so could not be held liable for the negligence of the driver.

In another case from the Second Circuit the Court rejected liability for a shore leave accident when the Captain and Purser were ashore and the Captain neglected to warn the Purser of an opening in the floor. It seemed that the Captain and Purser while ashore on ship's business stopped for coffee. On the way out of the cafe the Captain leading stepped around a cellar door but the Purser walked into it. The District Court had found the Captain negligent. The Court of Appeals while agreeing with the District Court that the Purser was in the course

of his employment held that the Captain's negligence was not within the scope of his employment. Liability was denied. *Trost* v. *Am. Haw. S.S. Co.*, 324 F.2d 225 (C.A. 2, 1963) cert. den. 376 U.S. 963. In the instant case, the District Court found that Ferguson driving to work was acting within the course of his employment. This is manifestly erroneous if it is a factual determination because Ferguson was not hired to drive the men back and forth to work. The defendant in this case could neither ask Ferguson to transport the men nor prohibit the men from riding with Ferguson nor prohibit Ferguson from transporting the men.

In 1959 the Court of Appeals for the First Circuit handed down a decision which illustrates the distinction that should be made in these cases. *Metropolitan Coal Co.* v *Johnson*, 265 F.2d 173 (C.A. 1, 1959). The *Johnson* case is illuminating because the injured employee was riding to work as a passenger on one of the defendant's trains. FELA liability was denied because, as the Court of Appeals stated, the employee, Johnson, as a passenger was not exposed to any employment risk. He was permitted recovery for common law negligence. Here Williamson would have a remedy against Ferguson for his negligence.[4]

In 1966, this Court decided the case of *Hopson* v. *Texaco, Inc., supra.* In the *Hopson* case, the taxi

[4] Other FELA cases denying liability for injuries received going to and from work are *Spoonamore* v. *Louisville & N.R. Co.*, 347 P.2d 1005 (N.M., 1960), and *Garcia* v. *A. T. & S. F. Ry. Co.*, 179 F. Supp. 290 (E.D. Ky., 1959).

collided while transporting the captain and two sick crewmen to a consul so they could be signed off the vessel and repatriated to the United States. This Court, citing FELA cases, held that, since the shipowner had a duty to take the men before the consul, the responsibility to get them there safely could not be abrogated by hiring an independent contractor.

Following *Hopson*, the Fifth Circuit in the case of *Magnolia Towing Company* v. *Pace*, 378 F.2d 12 (C.A. 5, 1967) held that the vessel owner was liable for the negligence of the ship's cook who had been dispatched to bring the plaintiff from a bus stop on his return from vacation.

With the foregoing as background, this case came up for trial. The testimony on the issue of men's status ashore was generally to the effect that they were on their own and were not subject to any direction or control of the petitioner. The testimony was as follows:

> "Q. (Mr. Gearin): When did you consider you would be on the job for the company, when you left home, when you got to the landing site or when you got on the dredge?
>
> A. When we got to the dredge." (Tr. 178, 179).

Ferguson, the driver, stated:

> "Q. (Mr. Gearin): When did you consider you would be on the job for the company, when you left home, when you got to the landing site or when you got on the dredge?
>
> A. When we got to the dredge." (Tr. 178, 179).

The superintendent Nielson testified on direct examination:

"Q. (Mr. Weisensee): Was there anything you could do to enforce your instructions? In other words, could you insist that these men ride alone?

A. No. When they are off work, they are off work and I don't have anything—I don't have anything over them once they leave the dredge." (Tr. 161).

* * * * *

"Q. (Mr. Evans): You say you regarded or felt that you had no control, you couldn't insist that they come in separate cars?

A. No.

Q. You told all of them you requested that; is that right?

A. I told them I would rather they brought their own cars.

Q. Did you ever tell any of them that was a requirement going to work?

A. No.

Q. You didn't feel you had that right?

A. No, I don't feel I have it.

Q. Now, what is the basis for that feeling, did you ever discuss that with your superiors?

A. When I was getting paid by the hour I didn't feel anybody, my captain or my mate, could tell me anything once I got off the dredge.

Q. That was your business then so long as you were there?

A. That's right. I felt I didn't have any more to say than they did to me." (Tr. 166, 167).

The third employee in the car, Edward Roberts, testified:

"Q. (Mr. Weisensee): Did you ever hear Mr. Nielson reprimand anybody or did he ever fire anybody for riding with somebody else?

A. No, he never said anything about it. I mean, he wouldn't reprimand them for it.

Q. Did you feel Mr. Nielson would have authority to tell you how to get to work, whether you were going to ride in your car or in somebody else's car?

A. No." (Tr. 49, 50).

The defendant's vice-president Robert W. Lofgrin testified:

"Q. (Mr. Weisensee): With regard to calling the men out of their shift turn, there's been testimony that the men are on call. Can you call men from home and have them come down to the job?

A. Yes, we can call an ask them if they would like to come in ahead of their shift.

Q. When the men leave the job are they supposed to go home and stay there?

A. No, sir.

Q. Is there any requirement that they be available?

A. No. No, sir. I think the superintendent hit it on the head that once they hit the beach, they don't have to be back for 16 hours. It's just like any other trade and they are free to do as they please, go have a drink with the boys or go shopping or anything.

If we do get in a bind, sometimes we do get on the phone to see if they are home and would they come on to work earlier. They are not on call. We have absolutely no control or we don't even think we do. It's very very seldom we have

to call to get a man in. It's just something that isn't done.

Q. Now, there's been some mention of getting the men to leave a number or someplace where they could be reached. What's the reason for that?

A. The main reason is that the dredge is a big animal and when something breaks down on it, sometimes it's a serious breakdown, and there is no need to have a crew in because we can't go dredging. Maybe we have to have one of the men in the engine room fixing the main engine, but we don't need a deck crew and we have to have their number to get a hold of them mainly to cancel the shift and keep them from showing up." (Tr. 172-174).

The trial judge made no attempt to rationalize the evidence in this case to fit *Hopson*. He stated that he was invading "virgin territory" in finding liability in this case. Both the District Court and the Court of Appeals sidestepped the traditional issues of any determination of whether Ferguson was acting within the course and scope of his employment by referring to another decision of this Court. This Court in *Braen* v. *Pfeifer Oil Trans. Co., supra*, had said that the term "course of employment" under the Jones Act was the equivalent of "service of the ship" formula used in maintenance and cure cases. In *Braen*, the injured seaman was ordered to do some work on a raft, which was used around the defendant's repair yard for working on the exterior of barges for chipping, painting and welding. The injured man was standing on a catwalk on another barge releasing a line when the

catwalk gave way, resulting in his injuries. His own barge was in the yard to have the cargo pump fixed. The issue in the case was whether the seaman would be entitled to recover under the Jones Act, even though his injury was not as a result of his work aboard the vessel to which he was assigned. The fact that the raft was not being used to repair the injured man's vessel was held immaterial as all that was necessary according to the Court was the fact that he be acting in the course of his employment "doing the work of his employer pursuant to his employer's orders."

Petitioner submits that to extract the equation of "service of the ship" as defining "course of employment" for purposes of cases such as *Braen* in improper and illogical under the facts of cases such as this one. Yet, this is exactly what the Courts of Appeals feel is required by this Court's decisions. *Braen* did not reach or involve the issue raised in *Trost* and *Thurnau*, *supra*. See *Lundberg* v. *New York*, *supra* footnote 1.

As an example of the erosion of the concept of course of employment that has been occurring, the petitioner refers the Court to *Vincent* v. *Harvey Well Service*, — F.2d — (C.A. 5, 1971), a decision handed down by the Court of Appeals for the Fifth Circuit. *Vincent* was decided the day before this case (April 8, 1971) and petition for rehearing has been denied. The opinion has not been published as yet. In *Vincent*, the seaman was permitted to recover against his employer for injuries sustained while riding as a passenger in an automobile furnished by the drilling

owner and driven by a fellow employee. The fellow employee was paid three hours per shift extra to compensate him for driving the car back and forth. The passenger employees did not receive any travel pay or duty pay while riding in the company car. The Court of Appeals said that in *Braen* that this Court had "reached a climax of considerable proportions" when it equated "service of the ship" with the statutory phase, "course of employment." The Court went on to quote from *Braen* that: "*Aguilar* and *Warren* 'make clear that the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships. They also supply relevant guides to the meaning of the term 'course of employment' under the Act since it is the equivalent of the 'service of the ship' formula used maintenance and cure cases.' "

The *Vincent* Court went on to say that there was a direct employer interest in the transportation here, which was not present in the *Sellers* case which had been decided by another panel of the Court, and *Sellers*, therefore, was distinguishable.

In January of 1971, the Court of Appeals for the Fifth Circuit heard argument in the case of *Daughdrill* v. *Diamond M Drilling Co.* reported below at 305 F. Supp. 836 (W.D. La. 1969). In *Daughdrill* the District Court found liability for a death sustained while driving to work. The District Court had found that the decedent was actually answering the call of

duty. That is, he was returning to the drill barge, the place of his employment. A decision is awaited.

This Court has held that workmen's compensation benefits were payable to a workman injured on his way to work whose travel pay "represented the approximate cost of travel" *Cardillo* v. *Liberty Mutual Insurance Co., supra.* In this case the travel pay was without regard to distance from home but was arbitrarily paid on the basis of the distance of the job site from the nearest City Hall of the city specifically mentioned in the contract with the union. The District Court noted that the petitioner could have either furnished room and board or paid the travel pay. This requirement, however, was not established by maritime law which traditionally has held that the right to maintenance and cure will not be conditional upon the terms of the contract between the employer and employee. See *Thomas* v. *Humble Oil and Refining Co.*, 292 F. Supp. 260 (E.D. Va. 1968), aff'd 420 F.2d 793 (C.A. 4, 1970).

This case is extremely important because if the rights of men commuting back and forth to work are to be determined by a maritime law they will be precluded from receiving workmen's compensation benefits and probably be denied benefits under compulsory automobile insurance plans or private insurance coverages either purchased themselves or through employer-union plans.[5] Traffic studies show the vast

[5] See e.g. *Seatrain Lines* v. *Medina*, 188 A.2d 169 (N.J., 1963).

percentage of commuters ride in their own automobiles, that is, that they do not establish car pools. For example if the driver Ferguson in this case had been killed or seriously injured he would have had no remedy under the Jones Act and would have received nothing by way of a permanent partial disability award nor would dependents' benefits, if he had been killed, have been awarded to his family. There is a whole body of law concerning entitlement to workmen's compensation benefits for injuries occurring during going and coming from work. See Larson, *Workmen's Compensation*, ch. IV. There is nothing in the law to prevent a workman such as Williamson from being a seaman while afloat and a non-seaman while going to and from work. If he were a harbor worker he would be covered under the Longshoremen's and Harbor Workers' Compensation Act while working afloat and under the State Compensation Act while working ashore. See *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969) reh. den. 397 U.S. 929.

This Court's decision in *Penn. R. Co.* v. *O'Rourke*, 344 U.S. 334 (1953) presents the obverse of the case at bar. In *O'Rourke*, a brakeman, injured on a carfloat, was denied the right to sue under the FELA; he was limited to compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act.

CONCLUSION

In *O'Donnell, Braen* and *Hopson,* this Court has faithfully and assiduously applied the proposition that the employer has to be responsible for the work being done under his direction and control. There is no basis for extending liability for negligence to cases where the employer has no possibility of controlling his own destiny. There is no social or moral justification for imposing liability for negligence in such a situation. The commuter is completely outside the control of the employer and therefore the employer should not be held responsible for injuries and should not be required to furnish either maintenance and cure or indemnity by virtue of liability assessed under the Jones Act. This Court's clarification is required.

Respectfully submitted,

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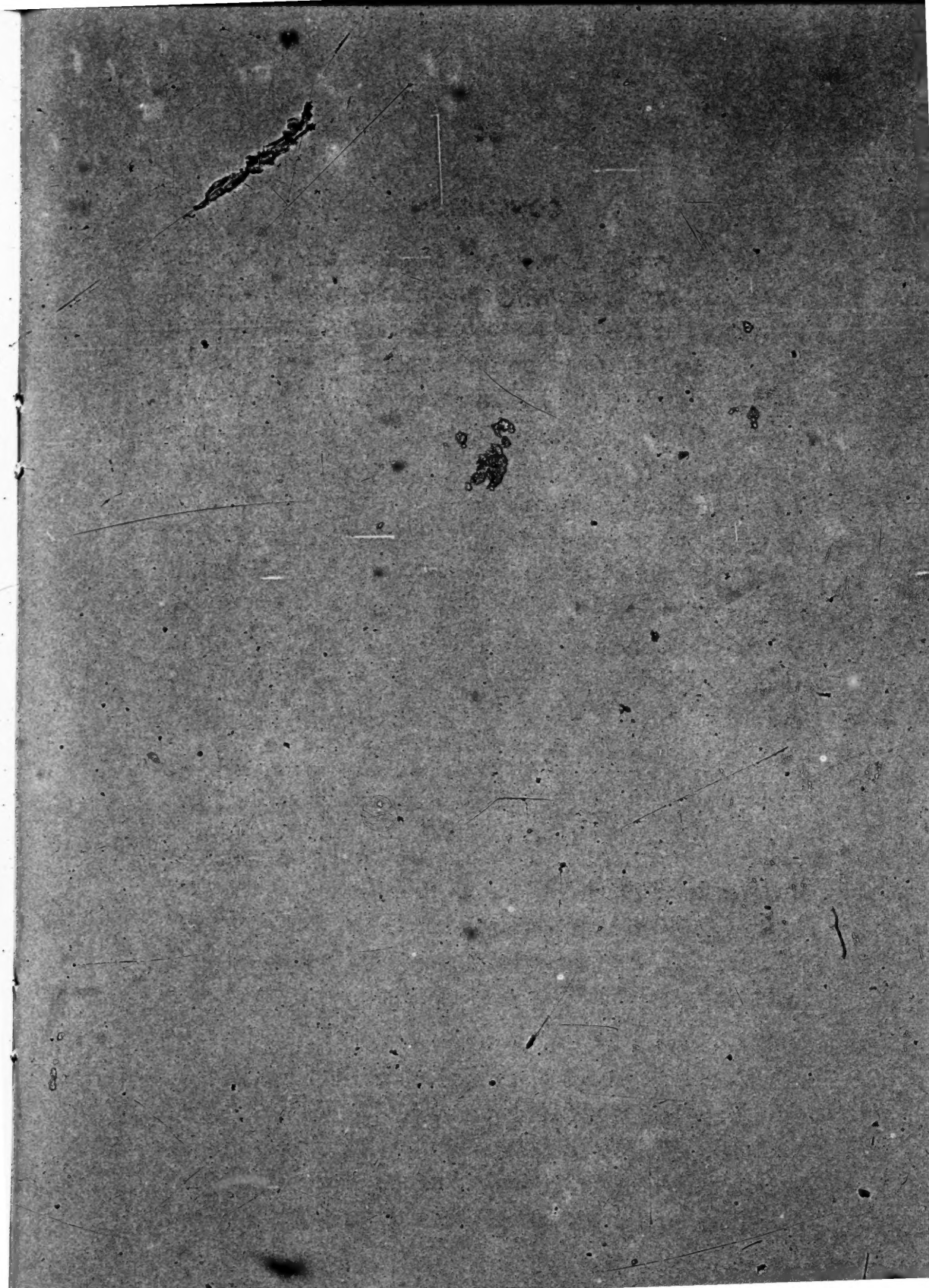
Of Counsel



APPENDIX

UNITED STATES DISTRICT COURT

JUDITH BARBARA WILLIAMSON, JAdministratrix of the Estate of Joel Dwaine Williamson, Deceased, Plaintiff, v. WESTERN-PACIFIC DREDGING CORPORATION, an Oregon corporation, Defendant, WESTERN-PACIFIC DREDGING CORPORATION, an Oregon corporation, Third Party Plaintiff, v. DON L. FERGUSON and PORTLAND SEATTLE FREIGHT LINES, a California corporation, Third Party Defendants.	CIVIL No. 68-174 FINDINGS AND OPINION

KILKENNY, JUDGE:

This action grows out of an automobile accident between a vehicle driven by third party defendant Ferguson and a truck operated by Portland Seattle Freight Lines. Two counts are involved, (1) maintenance and cure[and (2) damages for wrongful death under the Jones Act.

The accident occurred on December 21, 1967, in Clark County, Washington. Western-Pacific denies liability for maintenance and cure and for damages under the Jones Act and affirmatively alleges that if the accident arose out of and in the course of deced-

ent's employment, that plaintiff's sole remedy is under the Workmen's Compensation Law of the State of Oregon under its extra-territorial coverage.

Western-Pacific, with leave of Court, joined as third party defendants in admiralty, the driver, Ferguson, and the truck line, Portland Seattle Freight Lines. It claims indemnity against each. Third party defendants deny all liability to plaintiff and to Western-Pacific.

Plaintiff is the administratrix of the estate of Joel Dwaine Williamson and has been authorized by the Circuit Court of the State of Oregon to prosecute this action. Defendant Western-Pacific is an Oregon corporation, with its principal place of business in Portland, Oregon, and is the owner and operator of a dredge named H. W. McCURDY.

The dredge is a vessel 144 feet in length with a beam of 43 feet. It has a gross and net tonnage of 535 tons and is capable of limited movement, by manipulating its spuds and anchors, but is not self-propelled in the usual sense of the word. When the dredge is in use, it customarily operates with the assistance of one or more smaller tugs or tenders, which are self-propelled vessels.

On the indicated date, and for some time prior thereto, the dredge was being operated by Western-Pacific in the performance of a contract with the United States Department of the Army in connection with dredging the Columbia River for the purpose of

maintaining and improving the channel for use in navigation and commerce.

For more than two years before the accident, decedent had been employed by Western-Pacific on said dredge, initially as a deck hand and at and prior to the time of the accident as a mate. His duties consisted of assisting in the operation of the dredge and the maintenance thereof and assisting in the navigation and operation of the tender vessels and, when the dredge was being moved, assisting in its navigation. At the time of the accident, the dredge was operating in the Columbia River near Woodland, Washington. It was then operating three shifts of eight hours each per day. The practice of Western-Pacific was to rotate the shifts of its employees, other than employees engaged primarily in maintenance and repair, in such a manner that its employees would work one week on the day, the next week on the swing, and the next week on the graveyard shift.

As construction projects for the improvement of the channel of the Columbia became available, Western-Pacific would bid upon the same and if it received a contract, would move the dredge to the site at places up and down the Columbia River between Astoria and Hood River, Oregon. Likewise, Western-Pacific would designate various points on shore to which its employees should report and at which points its employees would be picked up and discharged by launch at the beginning and end of each shift. Each of the employees, by virtue of a union contract under which each

was employed, was entitled to and was paid "travel pay" by Western-Pacific. The amount of the "travel pay" depended on the distance between the project and the city hall in certain designated cities. At the time of the accident, decedent, and its other employees subject to the contract, were receiving $4.00 per day as "travel pay." On the mentioned day, decedent was employed as a mate, Don Ferguson as a deck hand and Edward Roberts as a lever man. In the week beginning December 18, 1967, and ending December 24, 1967, each was employed on the day shift. During that period, decedent and Ferguson adopted the practice of riding, in the same automobile, from the Interstate Bridge at Vancouver to work, each of the individuals driving one day and riding the following. Prior to the accident, the vehicle of Roberts had become unreliable. He then made or was making arrangements to acquire a newer vehicle and, for the period immediately before the date of the accident, the decedent and Don Ferguson had been driving alternate days. Roberts intended to drive continuously, after he had obtained his new car, for a sufficient number of days to equalize the expense and time involved in furnishing and operating an automobile to and from the location of the dredge. Roberts then lived in Vancouver, Washington, Ferguson in Portland and decedent in Clackamas, Oregon. Decedent and Ferguson customarily met in a parking lot at the Safeway Store, Jantzen Beach, at the Oregon end of the Interstate Bridge. From there they drove across the bridge to Vancouver, picked up Roberts and the three would proceed to

work. At the termination of the shift, the three would proceed by car to the freeway exit in Vancouver, leave Roberts, and drive to the Jantzen Beach parking lot where Ferguson and decedent would separate. The hours of the shifts being worked by the men were from 7:30 A.M. to 3:30 P.M. on the day, 3:30 P.M. to 11:30 P.M. on the swing and 11:30 P.M. to 7:30 A.M. on the graveyard shift.

Each of the three employees, at times, were subject to being required to work extra hours past the end of their regular shift to replace a member of the succeeding shift who did not report for work, and then work either a half or a whole shift until a replacement for the absent member could be arranged. At the time of the accident, Leroy Nielsen was superintendent of Western-Pacific's operations in connection with the dredge. He was the top ranking employee of Western-Pacific who customarily visited and was in charge of the operation of the dredge and its crew.

On the fatal day, about 7:00 A.M., Ferguson's vehicle was being operated by him, with decedent in the right front seat and Roberts in the rear. Some 15 miles north of Vancouver on Interstate Highway No. 5, on the way to work, the vehicle collided with a truck and tractor combination owned and operated by third party defendant Portland Seattle Freight Lines. It is admitted that the impact occurred on the westerly or southbound portion of said highway. The exact cause of the accident and any negligence in connection therewith is a dispute between the parties. De-

cedent received serious injuries in said accident. He died the same day at a Vancouver hospital. His death was a proximate result of the injuries he had received in said accident.

Argonaut Insurance Company, hereinafter referred to as "Argonaut," was and is a California corporation, engaged in the business of writing casualty and liability insurance and qualified to do so in the State of Oregon. On December 21, 1967, Western-Pacific was the named insured in certain policies of insurance issued by Argonaut wherein and whereby Argonaut insured defendant within certain limits against any liability of defendant for maintenance and cure, and any liabiilty of defendant under the Jones Act.

On said date, Western-Pacific was subject to the provisions of the Workmen's Compensation Law of the State of Oregon as a subject employer, and had provided coverage under said Workmen's Compensation Law by becoming a direct responsibility employer by filing with the Workmen's Compensation Board of the State of Oregon a contract issued by Argonaut, in which Argonaut agreed to assume without monetary limit the liability of Western-Pacific for compensation for injuries occurring to subject workmen.

Plaintiff incurred medical, hospital, x-ray and ambulance expense in the reasonable sum of $920.65, and funeral and burial expense in the reasonable sum of $1,800.00.

From the Bench, at the close of the trial, I held

that the defendant, Don L. Ferguson, the driver of the vehicle in which plaintiff's intestate was riding, was negligent in the following particulars:

(a) In driving at a speed that was greater than was reasonable and prudent under the circumstances then and there existing, to-wit: the impaired visibility, slippery surface due t oice and snow, and the curve in the highway, to-wit: in excess of 35 miles per hour,

(b) In attempting to pass a vehicle while proceeding around a left-hand curve when defendant knew or should have known of the hazard involved by reason of the possibility of ice and snow upon said highway, and the increased danger of skidding while accelerating or braking,

(c) In failing to keep said vehicle under proper control,

(d) In failing to keep a lookout for slick surfaces upon the highway,

(e) In failing to keep his vehicle on the right-hand half of said highway,

(f) In failing to have his vehicle equipped with chains or snow tires.

Moreover, I held that each of said acts of negligence was a proximate cause of decedent's injuries and resulting death,

Prior to trial, I segregated the issues between the third party plaintiff and the third party defendants, with the understanding that all relevant and material

evidence introduced in the main trial could be employed in deciding the issues between the third parties. Here, I might state that I can find no evidence of negligence on the part of third party defendant Portland Seattle Freight Lines and its motion to dismiss is allowed.

COMPENSATION ACTS

The effect of the Oregon Workmen's Compensation Act, although touched on in the briefs, is not seriously urged as a defense. We are here concerned with legislation enacted by the National Congress. Conceding, as I must, that a "twilight" zone may exist in which a seaman may elect to pursue a state-oriented remedy, such as one under a State Workmen's Compensation Act, or a State Employer's Liability Act, or may press his Federal claim, if any, under the Longshoremen and Harbor Workers' Act, *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962), I am of the view that the benefits of the Oregon Workmen's Compensation Act[1] are not available to an injured workman, or his beneficiaries, if the workman is a seaman. Such a person is expressly purged from the Oregon Act by ORS 656.027, subsection (4), which excludes "(4) a person for whom a rule of liability for injury or death arising out of and in the course of the employment is provided by the laws of the United States . . .", *Cassil* v. *United States Emergency Fleet Corp.*, 289 F. 774 (1923); *Martinson* v. *SIAC*, 154 Or. 423, 60 P.2d

[1] ORS 656.126, subsection (1).

972 (1936), *cert. denied* 300 U.S. 659. Also in point is *Calbeck* v. *Travelers Ins. Co., supra.*

Moreover, the Longshoremen and Harbor Workers' Act applies only to injuries occurring on navigable waters and excludes from coverage a member of the *crew* of a vessel. 33 U.S.C. § 903(a)(1). Already, I have found that decedent was a member of the crew of the McCURDY.

Of more than passing interest is the fact that plaintiff gave notice of the accident to Argonaut, the defendant's compensation carrier. Argonaut rejected the claim.

MAINTENANCE AND CURE

Defendant's challenge goes to the merits of this claim. A resolution of this issue necessarily involves the admiralty jurisdiction of the Court. To recover, plaintiff must establish that her husband, at the time of the fatal injury, was a seaman acting within the service of his ship. *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724 (1943). Here, there is no claim that decedent was guilty of culpable misconduct. Nor, on the record, is there any basis for such a claim.

Although defendant appears to concede that decedent was a seaman at the time of injury, nevertheless, a thorough discussion of his status is warranted. Beyond question, the McCURDY was a vessel in navigable waters. *City of Los Angeles* v. *United Dredging Co.*, 14 F.2d 364 (9th Cir. 1926). Moreover, aside from defendant's apparent concession, I find that de-

cedent was a "seaman" member of the McCURDY's crew. *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370 (1957); *Lawrence* v. *Norfolk Dredging Co.*, 319 F.2d 805 (4th Cir. 1963); *Norton* v. *Warner Co.*, 321 U.S. 565 (1944).

Left for discussion and decision is the issue of whether Williamson was acting in the service of his ship at the time of his fatal injury, so as to entitle plaintiff to maintenance and cure.

Aguilar teaches that maintenance and cure may be awarded to a seaman for injury incurred while the seaman is ashore and on his own business. There, the seaman was injured while crossing a dock on returning to his ship from shore leave. This was the only available route between the ship and the public street. In *Farrell* v. *United States*, 336 U.S. 511 (1949), the seaman overstayed his shore leave and on returning to the ship, in rain and darkness, became lost and attempted to enter the shore-front area about a mile from where the ship law moored. The general area was blacked out. In a partially lighted area, the claimant fell over a guard chain into a drydock, sustaining serious injuries. The Government did not challenge the allowance of maintenance and cure during his hospitalization, but did challenge his maintenance for life. *Warren* v. *United States*, 340 U.S. 523 (1951), extends the doctrine to a seaman, on shore leave, who was injured in a dance hall, some distance from the waterfront.

True enough, the seamen in *Aguilar*, *Farrell* and

Warren were more or less permanently based aboard ship. *Aguilar* mentions that such men could not "live for long cooped up aboard ship, without substantial impairment of their efficiency." Defendant attempts to make a distinction between these cases and one, such as here, where decedent commuted to his home each day after completing his work shift. It argues that decedent was the same as any shoreside worker. Inasmuch as decedent was less confined to the ship, says the defendant, his time spent away from the vessel, unlike the shore leave considered essential for a "cooped up" seaman, *Aguilar, supra,* should not here be considered to be in the service of the ship.

The framework of this rather misty distinction is destroyed by the well reasoned opinion in *Weiss* v. *Central Ry. Co. of New Jersey,* 235 F.2d 309 (2d Cir. 1956). There, the Court refused to deny a seaman his right to maintenance and cure because he did not live the life traditionally tailored to a seaman. In principle, the Court there held that a seaman was entitled to the traditional privileges of his status, even though he slept ashore at night. To hold otherwise, said the Court, would be to create a "genre of 'seamen' ineligible for the benefits of maintenance and cure, yet equally barred from recovery under the Longshoremen's Act, 33 U.S.C. § 903(a)(1)." 235 F.2d at 313. *Hudspeth* v. *Atlantic & Gulf Stevedores, Inc.,* 266 F. Supp. 937 (E.D. La. 1967) is in full support of *Weiss.*[2]

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[2] Neither *Weiss* nor *Hudspeth* considered an injury as far removed, in terms of the locus of the accident, as here presented.

In order to be in the service of the ship and entitled to recover, plaintiff must show that the decedent was "generally answerable to its call to duty, rather than actually in performance of routine tasks or specific orders." *Farrell, supra,* at 516. It is clear that decedent was as much answerable to the call to duty at the time of his injury as other seamen in the shore leave cases. Defendant elected not to provide sleeping quarters on board the McCURDY, and in lieu required its "seamen" to go home for each sleeping period. By making travel allowances, under these circumstances, decedent was, in effect, granted a daily "shore leave" just as a "blue water" seaman might have been granted shore leave while in port. In returning to the ship by automobile, at the time of the accident, he was better serving the ship than were some of the seamen in other shore leave cases.

Granting that the employment of the doctrine of maintenance and cure on these facts would be going somewhat outside the perimeter of established case law, nevertheless, I must recognize the flexibility of the ever expanding field of admiralty to meet the standards and requirements of an ever advancing age of civilization. Admiralty has been the guardian and protector of the seaman for many centuries. Its already lengthy arms will continue to grow, reach out and protect its seaman wards. The granting of maintenance and cure in this case will not, as argued by defendant, create a doctrine of absolute liability by negating the requirement of "service of the ship." I here hold and find that decedent was in the service of

the ship at the time of his injuries. For that matter, the doctrine of absolute liabiliy for maintenance and cure may already be established. *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525 (1938); Gilmore & Black Admiralty, 261 (1957). Of course, this case is factually distinguishable from a case where a seaman is injured in his home. *Palmer* v. *Boat Edith L. Boudreau, Inc.*, 223 N.E.2d 919 (Mass. 1967).

It is my considered judgment that to deny plaintiff a recovery for maintenance and cure would be "out of harmony with the spirit and function of the doctrine" and would run counter to the remedy's basic merit. Even in cases of doubt, the issue should be resolved in favor of the seaman. *Aguilar, supra.*

Plaintiff is entitled to prevail on the issue of maintenance and cure.

JONES ACT

Under this Act, plaintiff must prove that the decedent was a seaman, who was acting in the course of his employment at the time of the injury, and that the injury was caused by the fault of, or attributable to, his employer. *Braen* v. *Pfeifer Transportation Co.*, 361 U.S. 129 (1959).

The Jones Act[3] confers upon a seaman "who shall suffer personal injury in the *course of his employment*" the rights of action for personal injury and death available to railway employees under 45 U.S.C. § 51, the Federal Employers Liability Act, commonly

[3] 46 U.S.C. § 688.

known as FELA. The latter creates a cause of action in employees who *incur* ". . . *injury or death resulting in whole or in part from the negligence of* any of the officers, agents, or *employees* of such carrier. . . ." Already, I have found that Williamson was a seaman and was in the course of his employment at the time of occurrence. As to Ferguson, there is no sound reason to depart from my Williamson finding. However, liability for maintenance and cure is sometimes far afield from liability under the Jones Act. This difference makes imperative a discussion of the Jones Act, measured by FELA, as applied to these facts. To recover, plaintiff must show that Ferguson was in the "course of his employment" as that phrase is used in the Act, and that Ferguson was an officer, agent or employee, whose negligence, in whole or in part, contributed to the injury and resulting death of decedent.

In major part, plaintiff relies on the following facts: (1) that defendant was obligated, under the Union contract, to pay, and did pay, decedent and Ferguson each a travel allowance; (2) that defendant announced a policy, or directive, to its employees that they were not all to come to work in one car, this to indicate that defendant had exercised a right of control over the transportation method which employees might use to reach a particular job site; and (3) that on occasion defendant would ask various members of the McCURDY's crew to work longer hours and receive overtime when a worker on the following shift did not report. Although one of defendant's witnesses

testified that an order was issued requiring each worker to use his own automobile in going to work, the fact remains that the order, if any, was not enforced. It is clear that Williamson, Roberts and Ferguson had been regularly riding together in one automobile, that defendant had knowledge of this fact and made no objection thereto. If, in fact, such an order was issued, it would be some evidence of an exercise of control by the defendant, over its employees' method of transportation.

Although *Magnolia Towing Co.* v. *Pace*, 378 F.2d 12 (5th Cir. 1967) and *Hobson* v. *Texaco, Inc.*, 383 U.S. 262 (1966), point in plaintiff's direction, each is clearly distinguishable from the facts before me. Evidence in each of those cases clearly indicated an actual control over the seaman's method of travel.

Other cases cited by plaintiff, such as *Marceau* v. *Great Lakes Transit Corp.*, 146 F.2d 416 (2d Cir. 1945); *McDonald* v. *Buckeye S.S. Co.*, 103 F. Supp. 473 (N.D. Ohio 1951); and *Kyriakos* v. *Goulandris*, 151 F.2d 132 (2d Cir. 1945), the latter a maintenance and cure case, are less in point than *Hobson* and *Magnolia*. However, these cases lend support to the legal premise that the place of injury alone does not determine if an accident occurs "in the course of employment." So does *O'Donnell* v. *Great Lakes Co.*, 318 U.S. 36 (1943).

Plaintiff moves to solid ground when she equates decedent's status under the claim for maintenance and cure with that of decedent's status under the

Jones Act. She argues that to hold Williamson was "in the service of the ship" and thus entitled to maintenance and cure, but was not "in the course of employment," and thus not entitled to recovery under the Jones Act, is completely inconsistent. I agree. I find that Ferguson occupied the same status as Williamson. For that matter, it might be said that Ferguson's relationship, in his capacity as driver, was more concrete than that of Williamson. This view is supported by *Braen* v. *Pfeifer Transportation Co., supra*, where, in speaking of *Aguilar* and *Warren, supra*, it is said, "They also supply relevant guides to the meaning of the term 'course of employment' under the Act since it is the equivalent of the 'service of the ship' formula used in maintenance and cure cases." 361 U.S. at 132, 133. The respected authority, Gilmore & Black, The Law of Admiralty, p. 284, speaks on the subject, thusly: "This phrase has taken on, in the Jones Act context, a somewhat broader meaning than it has in Workmen's Compensation Acts. It may be read as equivalent to the 'in the service of the ship' formula used in the maintenance and cure cases. So long as the seaman is injured while 'answerable to the call of duty,' whether he is actually on duty or not, he is within the coverage of the Act."

Even in Workmen's Compensation cases, the decedent and Ferguson would be viewed as in the course of their employment at the time the accident occurred. In *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469 (1947), the Supreme Court, in speaking of a travel

allowance, in lieu of furnishing transportation, held that where there was the obligation, it was entirely irrelevant "whether the employer performs the obligation by supplying its own vehicle, hiring the vehicle of an independent contractor, or making arrangements with a common carrier, *reimbursing employees for the use of their own vehicles*, or reimbursing employees for the cost of transportation by any means they desire to use." 330 U.S. at 482, 483. (Emphasis supplied.) To the same effect is *United States Fidelity & Guaranty Co.* v. *Donovan*, 221 F.2d 515 (D.C. Cir. 1954).

Defendant's reliance on *Westinghouse Elec. Corp.* v. *Industrial Accident Comm'n.*, 239 Cal. App. 2d 533, 48 Cal. Rptr. 758 (1966), is completely misplaced. *Westinghouse* was disapproved by the California Supreme Court in *Zenith National Ins. Co.* v. *Workmen's Compensation Appeals Board*, 59 Cal. Rptr. 622, 428 P.2d 606 (1967). There, the Court held that when an employer makes a substantial payment for travel expense in order to induce an employee to accept work at a considerable distance from his home, the employer impliedly agrees that the employment relationship shall continue during the period of "going and coming." The Oregon Court, while not going as far as the California Court in *Zenith*, is susceptible to the same view. *Livingston* v. *State Industrial Accident Comm'n.*, 200 Or. 468, 266 P.2d 684 (1954).

Ebasco Services v. *Bajbek*, 79 Ariz. 89, 284 P.2d

459 (1955) is of little, if any, value to defendant. There, on facts similar to ours, the Arizona court held that while an agreement to extend the employer-employee relationship to cover time going and coming to the place of employment, might be implied from circumstances, it could not be implied where both the company and the union acknowledged an understanding to the contrary. In that case, defendant and the union, in joint conference, construed the travel pay provision of the contract as merely meeting out-of-pocket expenses and not as extending the employer's liability. Defendant's attempt to come within the rule of *Ebasco* was nullified by the failure of "Red" Wages, a former union official, to measure up as a credible witness. Simply stated, his testimony was such that I can give it no weight.

I find that Williamson and Ferguson were each "in the course of his employment" at the crucial moment.

The issue on whether Ferguson was acting within the course of his employment is necessarily entwined with the issue on whether decedent's injury, and resulting death, was due "in whole or in part from the negligence of any of the officers, agents, or employees of . . ." the defendant. Although Ferguson was not an officer of defendant and his agency might be subject to question, there can be little doubt but that he was an employee of the defendant. Fundamental law would prevent recovery by plaintiff unless Ferguson, even though an employee, was acting

in the course of his employment. I have already passed on that subject. Ferguson was acting within the perimeter of that restricted legal area. *Foster* v. *Massey*, 407 F.2d 343 (D.C. Cir. 1968) is of some assistance. There, the plaintiff was injured in his own automobile while driving to work and made a claim for Workmen's Compensation. Denying compensation on the facts there presented, Judge Prettyman summarized the applicable law in these words: "Usually the trip between home and work lacks all the characteristics of employment (time, place, pay, and employer control), *but if there is pay* for the trip, this thin link is deemed sufficient to bring the trip within the boundary of employment and thus of accident compensability. But obviously, in order to constitute such a link, the identification of pay with trip must be specific and certain. It is not enough that before the trip begins workers are on call rather than on fixed schedule, or to argue in the abstract that the overall compensation takes account, as a background fact, of the inconvenience of being on call rather than being on a fixed schedule." 407 F.2d at 345, 346. Here, the identification of pay with trip is specific and certain. The *Braen*, *Aguilar* and *Warren* cases, *supra*, lend stout support to the Prettyman statement. Although a finding for plaintiff on this record is invading virgin territory, yet untouched by judicial decision, the courts must recognize the monumental march of our present civilization, particularly in the transportation sphere. Inasmuch as defendant found it to its advantage to pay to its employees a fixed

transportation fee, rather than provide quarters aboard the ship, it cannot now escape liabiliy by claiming that decedent and Ferguson were not employees in the course of their employment. With modern highways and ultra-modern and foolproof motor vehicles, the defendant had a "fielder's choice"; it could provide quarters aboard ship for decedent and Ferguson, or it could pay the costs of transportation to and from work. Under the union contract, it elected to do the latter. Not to be forgotten is the oft-stated dogma that the Jones Act created new rights in seamen arising out of maritime torts and must be given a liberal construction in order to accomplish its beneficient purposes. *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (1949). On all of the facts under the law, as I interpret it, I find and conclude that plaintiff is entitled to recover.

The recent case of *Tim* v. *American President Lines, Ltd.*, 409 F.2d 385 (9th Cir. 1969), is cited by defendant. I fail to find a similarity between the facts in *Tim* and the facts before me. In *Tim*, the *Court* found that Matson Terminal was not the agent or employee of defendant, had no oral or written contract with the alleged agent, nor did it have any ownership or financial interest in the alleged agent. *Tim* does not provide an escape hatch for defendant.

DAMAGES

Decedent, at the time of his death, was 25 years of age. His wife was the same age. His two sons were age 1 and 2 years respectively. Decedent had a life

expectancy of approximately 44 years, and a working life expectancy of approximately 39 years. During the first 11 and 2/3 months of the year 1967, deceased had a gross income of $14,970.63. Had he worked the full year, he would have earned approximately $15,300.00. In 1966, his total wages were $15,906.00. In 1965, $9,284.61. He was a devoted father and husband, and was well thought of by his fellow employees and employer. His supervisor testified that decedent was a "congenial and an excellent worker and that there was no reason why decedent could not have continued to work and receive further promotions." The family was successfully maintaining a savings program and making real estate investments.

Invoking a formula somewhat similar to that employed by Judge Weinfeld in *Petition of Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 15 (S.D. N.Y. 1965), I find that plaintiff and her two children have sustained total general damages in the sum of $130,000.00. I find it unnecessary to give the details on which I arrive at this figure. Allowable medical and funeral expenses would be in addition to the general award.

During the course of the trial, objections were made to the receipt in evidence of plaintiff's Exhibits 16 and 18 through 24. The objections are overruled as to 16 and 23 and sustained as to the remainder. I do not believe that Roberts original statement, Exhibit 18, tends to impeach his deposition, Exhibit 23. Inas-

much as Nielson, Hull, Bonebrake, Williamson and Ferguson testified in the trial, the admission of their depositions would serve no useful purpose.

The foregoing shall serve as my findings and conclusions. A conforming judgment reflecting my findings and conclusions, using appropriate language to permit an immediate appeal, shall be drafted, served and presented by counsel for plaintiff.

DATED this 19th day of August, 1969.

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JUDITH BARBARA WILLIAMSON, Administratrix of the Estate of Joel Dwaine Williamson, Deceased, Plaintiff,	
v.	
WESTERN-PACIFIC DREDGING CORPORATION, an Oregon corporation, Defendant,	CIVIL NO. 68-174
WESTERN-PACIFIC DREDGING CORPORATION, an Oregon corporation, Third Party Plaintiff,	JUDGMENT ORDER
v.	
DON L. FERGUSON and PORTLAND SEATTLE FREIGHT LINES, a California corporation, Third Party Defendants.	

This action came on for trial before the Court, Honorable John F. Kilkenny, District Judge, presiding and the issues between plaintiff Judith Barbara Williamson and defendant Western Pacific Dredging Corporation, having been duly tried, and the issues between the third party plaintiff and the third party defendants, having been segregated with the understanding that all relevant and material evidence introduced in the main trial could be employed in deciding the segregated issues between the third parties, and a decision in writing having been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiff, Judith Barbara Williamson, Administratrix

of the Estate of Joel Dwaine Williamson, Deceased, recover of the defendant, Western Pacific Dredging Corporation, an Oregon corporation, $4.00 as maintenance, $920.65 for medical and hospital expenses, $1,820.00 for burial and funeral expenses, and $130,000.00 as general damages, or the total sum of $132,744.65, together with interest thereon at the rate of 6 per cent per annum from August 19, 1969, until paid, and her costs of action.

IT IS FURTHER ORDERED AND DETERMINED that there is no just reason for delay and that judgment for plaintiff should be entered forthwith; and

IT IS FURTHER ORDERED AND ADJUDGED that third party plaintiff's claim against Portland Seattle Freight Lines, a California corporation, be dismissed and that third party defendant Portland Seattle Freight Lines, a California corporation, recover its costs and disbursements from third party plaintiff; and

IT IS FURTHER ORDERED AND ADJUDGED that third party plaintiff's claim against third party defendant, Don L. Ferguson, is reserved for further trial.

DATED this 18th day of September, 1969.

/s/ JOHN F. KILKENNY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH BARBARA WILLIAMSON, Plaintiff-Appellee,	)	Filed
v.	)	April 9,
WESTERN PACIFIC DREDGING Defendant-Appellant.	)	1971
JUDITH BARBARA WILLIAMSON, et al., Plaintiffs-Appellees,	)	Wm. B. Luck, Clerk
v.	)	No. 25,156
WESTERN PACIFIC DREDGING Defendant-Appellant.	)	No. 25,157

Appeal from the United States District Court
for the District of Oregon

Before: JERTBERG, BROWNING, and TRASK,
Circuit Judges

PER CURIAM:

We affirm the district court's holding that in the particular circumstances of this case plaintiff's decedent, a seaman employed aboard defendant's dredge who lived at home and drove to and from work daily, was entitled to recover both maintenance and cure and damages under the Jones Act because of injuries sustained in an automobile accident while commuting. See 304 F. Supp. 509 (D. Or. 1969).

Defendant argues that maintenance and cure should be available for shoreside injuries only when they are incurred on shore leave and that plaintiff's decedent was not on shore leave but was living in his

own home under conditions that made the rationale of the shore leave cases inapplicable to him.

It is true that the ditsrict court cited shore leave cases and that passages in the court's opinion may suggest that maintenance and cure was awarded on he premise that the accident occurred wrile the decedent was on a "daily shore leave.

The court relied upon the shore leave cases primarily, however, to support the proposition that maintenance and cure may be recovered even though the seaman's injury did not occur aboard ship. Moreover, shore leave was not involved in either of the two cases upon which the court principally relied, *Weiss* v. *Central R.R.*, 235 F.2d 309 (2d Cir. 1956), and *Hudspeth* v. *Atlantic & Gulf Stevedors, Inc.*, 266 F. Supp. 937 (E.D. La. 1967). In both, as defendant itself points out, the disability resulted from the seamen's activities while on duty. Thus the award of maintenance and cure rested upon the district court's finding, supported by the record, that commuting was part of the job plaintiff's decedent was employed to perform—that in the circumstances of this case "the hazards of the journey may fairly be regarded as the hazards of the service." *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 479 (1947)[1] See *Hopson* v.

[1] This Workmen's Compensation Act case interpreting the phrase "in the course of employment" is relevant because the Jones Act utilizes the same standard, 46 U.S.C. § 688, which "is the equivalent of the 'service of the ship' formula used in maintenance and cure cases." *Braen* v. *Pfeifer Transp. Co.*, 361 U.S. 129, 133 (1959).

Texaco, Inc., 383 U.S. 262 (1966);[2] *Magnolia Towing Co.* v. *Pace*, 378 F.2d 12 (5th Cir. 1967);[2] *Sullivan* v. *United States*, 73 F. Supp. 525 (S.D. N.Y. 1947), *aff'd*, 179 F.2d 924 (2d Cir. 1949). For this reason it does not necessarily follow from the district court's decision, as defendant suggests, that defendant would have been liable had plaintiff's decedent sustained the injury at home. That would be another case, as to which we intimate no opinion.[3]

With respect to Jones Act liability, defendant's argument consists largely of an attack upon the factual support for the district court's conclusion that plaintiff's decedent and the driver of the car were acting in the course of their employment. As we have said, this finding had adequate support in the record, which the district court's opinion reflects. Defendant argues with particular vigor that it lacked power to control the commuters. It is sufficient to repeat: "The presence or absence of control is certainly a factor to be considered. But it is not decisive. An employer may in fact furnish transportation for his employees without actually controlling them during the course of the journey or at the time and place where the injury occurs. . . . And in situations where the journey is in other respects incidental to the employment, the ab-

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[2] These Jones Act cases are relevant under *Braen*.

[3] Defendant also contends that the claim for maintenance and cure became "moot" when plaintiff received insurance benefits sufficient to pay medical and funeral expenses from a health and welfare trust fund to which defendant contributed. We do not reach the merits of this contention for there is nothing in the record or appeal to indicate that it was raised below.

sence of control by the employer has not been held to preclude a finding that an injury arose out of and in the course of employment." *Cardillo* v. *Liberty Mutual Ins. Co., supra*, 330 U.S. at 480-81.

Defendant argues that the district "court's reasoning would have supported recovery if Williamson had died from poisonous food negligently served by his wife. It likewise would have supported recovery if Williamson had fallen out of bed." The argument is faulty for two reasons. The district court's Jones Act holding, like the award of maintenance and cure, rested upon the premise that plaintiff's decedent was in the course of employment while commuting, not that all of his activities ashore fell within this category. In the second place, an employer's liability under the Jones Act is limited to "injuries negligently inflicted on its employees by its 'officers, agents, or employees.'" *Hopson* v. *Texaco, Inc., supra*, 383 U.S. at 263. Defendant was liable under the Jones Act only because the injuries resulted from the negligence of one of its employees, the driver.

On her cross-appeal, plaintiff contends that the general damage award under the Jones Act was insufficient and that the court should have allowed prejudgment interest calculated from the time of death.

We agree with defendant that in such a case as this "damages are most difficult of assessment and many items . . . can only be set arbitrarily." We cannot say that the district court's finding of damages was clearly erroneous. Although it may well be that

prejudgment interest is available in a Jones Act case tried, as here, in admiralty, *see Sanford Bros. Boats, Inc.* v. *Vidrine*, 412 F.2d 958, 972-73 (5th Cir. 1969); *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F.2d 583, 592-93 (2d Cir. 1961); *Petition of Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 15, 25 n. 22 (S.D. N.Y. 1965); *Gardner* v. *National Bulk Carriers, Inc.*, 221 F. Supp. 243, 247-48 (E.D. Va. 1963), *aff'd*, 333 F.2d 676 (4th Cir. 1964), the allowance of interest rests within the trial court's sound discretion, *see, e.g., Gardner* v. *National Bulk Carriers, Inc.*, 333 F.2d 676 (4th Cir. 1964), and plaintiff has made no attempt to show that the court abused its discretion here.

Affirmed.